Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THE STATE OF OKLAHOMA,

Petitioner,

vs.

ARTHUR GERALD GRAVES,

Respondent.

On Petition For Writ Of Certiorari To The Oklahoma Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of this Court's decision in *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), a state court can reverse a conviction on ineffective assistance of counsel grounds without any evaluation of whether prejudice occurred?

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PETITION FOR WRIT OF CERTIORARI

The State of Oklahoma respectfully requests this Court to grant a petition for writ of certiorari to review the Opinion of the Oklahoma Court of Criminal Appeals entered January 20, 2006. *See Graves v. State*, Case No. F-2004-688 (Okla. Crim. App. 2006) (unpublished).

OPINIONS BELOW

The Opinion of the Oklahoma Court of Criminal Appeals has not been reported. It is reprinted at pages App. 1-13 of the appendix. The Order of the Oklahoma Court of Criminal Appeals denying rehearing is reprinted at pages App. 14-15 of the appendix.

STATEMENT OF JURISDICTION

The Opinion and Mandate of the Oklahoma Court of Criminal Appeals (OCCA) was entered on January 20, 2006. Petitioner filed a Petition for Rehearing on January 27, 2006. The Order Denying Petition for Rehearing was entered on February 14, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). *See also* 28 U.S.C. §§ 2101(d), 2102.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

> the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Respondent is currently incarcerated pursuant to a Judgment and Sentence entered in the District Court of Tulsa County, Oklahoma, Case No. CF-2002-5443. Respondent was tried by the court without a jury for the crime of trafficking in illegal drugs (crack cocaine). The trial court found Respondent guilty and sentenced him to life imprisonment without the possibility of parole and a $25,000 fine.

In an unpublished opinion filed on January 20, 2006, the OCCA reversed Respondent's conviction and sentence and remanded the case for a new trial. *Graves v. State*, Case No. F-2004-688 (Okla. Crim. App. 2006). Rehearing was denied by the OCCA on February 14, 2006.

STATEMENT OF FACTS

On October 23, 2002, detectives from the Tulsa Police Department's gang unit observed short-term pedestrian traffic coming and going from room 206 of the Georgetown Hotel in Tulsa, Oklahoma. (Trial Tr. 8-9). The Georgetown Hotel is located in an area that is known for narcotics sales. (Trial Tr. 8-9). Detectives Shawn Hickey,

W. Walthuis and Jeffery Gatwood knocked on the door of room 206 and were given permission to enter by the woman who answered the door. (Trial Tr. 11). There were several women in the room. (Trial Tr. 13). The detectives obtained permission to search the room, but did not find anything in their search. (Trial Tr. 15).

The detectives were in the process of wrapping up their investigation when someone knocked on the door to the room. (Trial Tr. 26). Detective Wolthuis opened the door and let the Respondent into the room. (Trial Tr. 16-17). Detective Gatwood observed that the Respondent was clenching a plastic bag in his right hand. (Trial Tr. 45). Detective Gatwood could see what he suspected to be cocaine protruding from the Respondent's right hand. (Trial Tr. 45). Detective Gatwood observed that Respondent became nervous and began to shake when they introduced themselves as police officers. (Trial Tr. 45). Detectives Gatwood and Wolthuis placed the Respondent under arrest and recovered three rocks of crack cocaine from the Respondent's right hand. (Trial Tr. 19, 46, 76). The cocaine taken from Respondent weighed a total of 7.19 grams. (Trial Tr. 75).

In support of his motion to suppress the crack cocaine, which was consolidated with the non-jury trial, the Respondent testified that Detective Wolthuis placed his hands on the Respondent's shoulder blades in a very rough manner when the Respondent first entered the room. (Trial Tr. 87). The Respondent said that Detective Gatwood then came around the corner and "bashed" the Respondent. (Trial Tr. 87). According to the Respondent, he had only his keys in his right hand. (Trial Tr. 88). The Respondent testified that Detective Wolthuis reached into the

Respondent's right front pocket to recover the cocaine. (Trial Tr. 88).

REASON FOR GRANTING THE WRIT

This Court's review of this matter is necessary because the decision of the OCCA to reverse Respondent's conviction based on a breakdown in the adversarial process, but without an evaluation of prejudice, directly conflicts with this Court's decisions in *Strickland v. Washington* and *Bell v. Cone*.

I.

THE OCCA FAILED TO FOLLOW THIS COURT'S HOLDINGS IN *STRICKLAND V. WASHINGTON* AND *BELL V. CONE* THAT A CONVICTION MAY NOT BE REVERSED ON THE BASIS OF ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL IF THE DEFENDANT FAILS TO DEMONSTRATE THAT HE WAS PREJUDICED BY COUNSEL'S ALLEGED ERRORS.

In his appeal to the OCCA, Respondent claimed that he was denied the effective assistance of counsel. Relying on this Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Respondent identified three areas in which he claimed counsel's performance was deficient: (1) counsel's advice to Petitioner that he waive his right to trial by jury, (2) counsel's performance at the non-jury trial and (3) counsel's written motions. Respondent did not assert that his was a case in which prejudice should be presumed. *Cf. Strickland*, at

692, 104 S.Ct. at 2067 (stating that in certain contexts, prejudice is presumed); *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657 (1985) (stating that there are circumstances that are so likely to result in prejudice that the cost of litigating their effect is unjustified).

In its opinion reversing Respondent's conviction, the OCCA found that counsel's performance was not reasonable and that, "This Court cannot conclude that there is no reasonable probability that the result of the proceeding might have been different but for counsels' errors." *Graves*, at 2. Thus, although the OCCA did correctly state the *Strickland* standard at the beginning of its opinion, Petitioner respectfully submits that a review of the rest of the court's opinion reveals that the OCCA actually presumed prejudice based on an alleged breakdown in the adversarial process.

Before analyzing the OCCA's application of *Strickland*'s second prong, Petitioner would point out that the OCCA also applied a presumption of unreasonableness to counsels' conduct. *Strickland* requires a reviewing court to strongly presume that counsel rendered adequate assistance. *See Strickland*, at 689-90, 104 S.Ct. at 2065-66. However, in addressing Respondent's claims that trial counsel should have invoked the rule of sequestration and should have requested consideration of a lesser included offense, the OCCA found that, "Whether or not such invocation [of the rule of sequestration] was necessary or any lesser included offenses were available is, under these circumstances, beside the point. These failures are simply an indication of how poorly the advocacy process worked in this case." *Graves*, at 4-5.

The OCCA declined to address the merits of Respondent's contentions with respect to these two issues, but in the very next sentence the court referred to those issues as "failures." *Id.* In his dissent, Judge Lumpkin stated that the majority "appears to have given only lip service to the presumption of counsel's competence and the deference to be accorded strategic decisions." *Graves*, at 1 (Lumpkin, J., dissenting). Judge Lumpkin then went on to find that counsels' failure to invoke the rule was not professionally unreasonable. *Id.*, at 2-3 (Lumpkin, J., dissenting). Judge Lumpkin also found that counsel were not ineffective for failing to ask the court to consider a lesser included offense because no evidence warranted consideration of a lesser offense. *Id.*, at 3 (Lumpkin, J., dissenting). Thus, the OCCA presumed (incorrectly) that counsels' performance was unreasonable. This finding was in clear contradiction to this Court's holding in *Strickland* that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, at 689, 104 S.Ct. at 2065.

After presuming that counsels' performance was deficient in these two areas, the OCCA proceeded to an evaluation of counsels' other alleged errors. The OCCA found that counsels' written motions and oral arguments were deficient because they cited to cases that were irrelevant and, in some cases, no longer good law. *Graves*, at 5-7. The OCCA further found that counsel should have presented the trial court with the hearsay statements of two of the women who were in the hotel room at the time of Petitioner's arrest. *Id.*, at 7.

According to a document attached to Respondent's motion for new trial, Dee Hargrave and Julie Fields both told Respondent's first attorney, Jim Fransein, that the police recovered the crack cocaine from Respondent's

pocket. (O.R. 85-107). The attorneys who represented Respondent at trial tried, unsuccessfully, to find Ms. Hargrave and Ms. Fields and present their testimony at trial. (Trial Tr. 3, 92-94). However, counsel did not present the trial court with the transcript of the witnesses' statements to Mr. Fransein. Petitioner argued to the OCCA that there is no reasonable probability that the statements of Ms. Hargrave and Ms. Fields would have caused the trial court to change its finding that there was "every reason to believe the police in this case." (Trial Tr. 111).

Ms. Hargrave and Ms. Fields were apparently unwilling to come to court and testify under oath that the drugs were found in the Respondent's pocket. Ms. Hargrave and Ms. Fields were in a hotel known for drugs and prostitution. (Trial Tr. 8, 42). The officers observed several people coming and going for short periods of time from the room in which Ms. Hargrave and Ms. Fields were found. (Trial Tr. 42). One of the persons in the room was arrested on a felony warrant. (Trial Tr. 38). The women in the room had nicknames like Nono and Precious. (O.R. 90, 92).

In addition, there were inconsistencies in the statements of Ms. Hargrave and Ms. Fields. Ms. Hargrave stated that Officer Gatwood took her into the bathroom and talked with her after he arrested the Respondent. (O.R. 93). Ms. Fields stated that Officer Gatwood took Ms. Hargrave into the bathroom before the Respondent arrived at the room. (O.R. 100). Officer Hickey could not recall that Officer Gatwood took anyone into the bathroom. (Trial Tr. 31). Officer Gatwood testified that he would not take a female into a bathroom without a female officer present. (Trial Tr. 65). Ms. Fields stated that the officers took some marijuana from Ms. Hargrave, but did not arrest her. (O.R. 102). Officer Hickey testified that they

did not find anything in their search of the room. (Trial Tr. 15).

Ms. Hargrave stated that she was positive that the crack cocaine was taken out of the Respondent's watch pocket, the small pocket on top of the other pocket. (O.R. 94-95). On the other hand, Ms. Fields stated that the officers dug deep in the Respondent's pockets to get the crack cocaine. (O.R. 106). If the crack cocaine was, as Ms. Hargrave claimed, in the watch pocket of the Respondent's jeans then the officers would not have had to dig for it, as Ms. Fields claims they did. Defense counsel attempted to make it seem as if the jeans were baggy and had pockets that went all the way down on the side. (Trial Tr. 36). Defendant's Exhibit 2, admitted into evidence at trial, shows that the jeans the Respondent was wearing were, in fact, tight jeans that do not have cargo type pockets. The officers could not have dug deep in the Respondent's pockets as Ms. Fields claims they did.

In addressing Petitioner's claim that Respondent was not prejudiced, the OCCA stated,

> The State urges us to conclude that this failure would not have affected the ruling on the motion to suppress, since the statements were inconsistent and the witnesses were unsavory (and thus presumably untruthful) and apparently unwilling to testify. *While the trial court may not have been swayed by this evidence, counsels' blatant failure to present it is part of the pattern of failure, miscommunication, and error that dogged this trial.*
>
> *Given the facts of his case, Graves had virtually no chance.* The actions of his trial "team" made

> his case even worse. Counsel worked at cross-purposes in law and argument, completely failed to present favorable evidence in possession of the defense, insisted on arguing issues and defenses not present in this case, failed to argue relevant law during the suppression hearing, and misstated both facts and law. *Reviewing the proceedings as a whole, this Court has no confidence that counsel fulfilled the function of making the adversarial testing process work.* This case is reversed and remand (sic) for a new trial with effective counsel.

Graves, at 7-8 (emphasis added).

The decision of the OCCA focused entirely on how poorly the OCCA believed that Respondent's attorneys performed. The OCCA failed to address Petitioner's contention that, in light of the lack of credibility inherent in the statements of Ms. Hargrave and Ms. Fields, there is no reasonable probability that the trial court would have relied upon those statements to suppress the evidence against Respondent. In fact, the OCCA all but conceded that counsels' use of the statements would not have affected the outcome of the trial. *Graves*, at 7-8.

In *Strickland*, this Court stated that "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, at 2066, 104 S.Ct. at 691. The OCCA expressly relied on *Strickland*, as well as other decisions of this Court and the OCCA applying the *Strickland* standard. The OCCA did not cite to any cases in which prejudice has been presumed. Nevertheless, it appears that the OCCA presumed prejudice based on counsels' alleged failure to make the

adversarial testing process work. *Graves*, at 8. This Court stated in *Strickland* that unless a defendant shows deficient performance *and prejudice*, it cannot be said that a conviction resulted from a breakdown in the adversarial process. *Strickland*, at 687, 104 S.Ct. at 2064.

In *Bell v. Cone*, 535 U.S. 685, 693, 122 S.Ct. 1843, 1849, 152 L.Ed.2d 914 (2002), the Sixth Circuit presumed prejudice and reversed a defendant's death sentence after finding that defense counsel, by failing to give closing argument, failed to subject the state's case to meaningful adversarial testing. Quoting *Strickland*, this Court stated that,

> Without proof of both deficient performance and prejudice to the defense, we concluded, it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable and the sentence or conviction should stand.

Cone, at 695, 122 S.Ct. at 1850 (internal citations omitted).

Nevertheless, the Respondent in *Cone* claimed that prejudice should be presumed based on this Court's statement in *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984) that a presumption of prejudice is warranted if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cone*, at 696, 122 S.Ct. at 1851. This Court disagreed, emphasizing that a presumption of prejudice applies only if counsel fails to oppose the prosecution throughout the proceeding. *Id.* at 696-97, 122 S.Ct. at 1851.

Because the alleged deficiencies of counsel, i.e. failing to present mitigating evidence and waiving closing argument, were of the same type as other specific attorney errors to which this Court has previously applied the *Strickland* standard, this Court found that the Sixth Circuit erred in presuming prejudice. *Cone*, at 697-98, 122 S.Ct. at 1851-52 (2002). Similarly, in the case at bar, Respondent alleged that his attorneys made a specific error in failing to present available evidence in support of the motion to suppress.

Although other alleged errors of counsel were raised, Respondent did not claim that his attorneys entirely failed to subject the state's case to meaningful adversarial testing. The record demonstrates that counsel worked very hard to get the evidence against the Respondent suppressed, and to undermine the credibility of the officers' testimony. (P.H. 20; O.R. 52-56; Trial Tr. 51-52, 57, 61-62, 102-03). Counsel pointed out to the court that the officers did not have a warrant or justification to search the Respondent without a warrant. (Trial Tr. 100-01; O.R. 54). In examining the State's witnesses and in closing, counsel tried to establish that officers could not have seen the cocaine in Respondent's hand. (Trial Tr. 25, 34-35, 50, 68-69, 102). Counsel also presented the testimony of Respondent that officers removed the cocaine from his pocket. (Trial Tr. 88).

Respondent's attorneys did not completely fail to subject the state's case to meaningful adversarial testing. Therefore, the OCCA's decision to reverse Respondent's conviction in spite of the lack of prejudice was improper. *See Williams v. Taylor*, 529 U.S. 362, 391, 120 S.Ct. 1495, 1512, 146 L.Ed.2d 389 (2000) ("When a true adversarial criminal trial has been conducted – even if defense counsel

may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred."); *Strickland*, at 700, 104 S.Ct. at 2071 (Failure to make the required showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim). In light of the OCCA's blatant failure to adhere to this Court's prior holdings, this Court should grant certiorari to review the OCCA's decision and correct this error.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ARTHUR GERALD GRAVES Appellant, v. THE STATE OF OKLAHOMA Appellee.	)	NOT FOR PUBLICATION Case No. F-2004-688

OPINION

(Filed Jan. 20, 2006)

CHAPEL, PRESIDING JUDGE:

Arthur Gerald Graves was tried in a non-jury trial and convicted of Trafficking in Illegal Drugs in violation of 63 O.S.Supp.2002, § 2-415, After Former Conviction of Two or More Felonies, in the District Court of Tulsa County, Case No. CF-2002-5443. The Honorable Tom C. Gillert sentenced Graves to life in prison without the possibility of parole and a $25,000 fine. Graves appeals from this conviction and sentence.

On October 23, 2002, Tulsa police officers saw a high volume of pedestrian traffic at room 206 of the Georgetown Hotel. They knocked on the door at approximately 5:00 p.m., identified themselves as plainclothes officers, and were admitted. The three women in the room gave the officers permission to search. During the search Graves knocked on the door and was admitted by an officer. Officers testified Graves had a plastic bag visible in his hand and became nervous when they identified themselves. Officers arrested, handcuffed and searched Graves, and found three rocks of cocaine weighing approximately

7.19 grams along with $150.00 in cash. Graves challenged the arrest and search, arguing police had no probable cause for either. He testified that he was carrying his keys in his hands when he entered the room, and officers only found the cash and drugs after searching his pockets. The trial court denied Graves's motion to suppress the evidence against him, and the bench trial followed.

Graves first claims that he was denied the effective assistance of counsel. A review of the entire record in this case, compels us to conclude that Graves did not receive the effective assistance of counsel to which he is entitled under the Sixth Amendment. Taking the record as a whole, counsels' performance was neither reasonable under prevailing professional norms nor equaled sound trial strategy.[1] This Court cannot conclude that there is no reasonable probability that the result of the proceeding might have been different but for counsels' errors.[2] In assessing effective assistance of counsel, we presume counsel is competent and gives great deference to strategic decisions.[3] We recognize that counsels' task in this case was not easy. However, measured against an objective standard of reasonableness under prevailing professional

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[1] *Ryder v. State*, 2004 OK CR 2, 83 P.3d 856, 874-75, *cert. denied*, 543 U.S. 886, 125 S.Ct. 215, 160 L.Ed.2d 146; *Patterson v. State*, 2002 OK CR 18, 45 P.3d 925, 929 (2002); *Banks v. State*, 2002 OK CR 9, 43 P.3d 390, 402, *cert. denied*, 537 U.S. 1126, 123 S.Ct. 898, 154 L.Ed.2d 811; *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 317, *cert. denied*, 534 U.S. 963, 122 S.Ct. 371, 151 L.Ed.2d 282.

[2] *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Hooks*, 19 P.3d at 317.

[3] *Rompilla v. Beard*, ___ U.S. ___, 125 S.Ct 2456, 2462, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 2536, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Hooks*, 19 P.3d at 317.

norms, counsels' conduct fell below the level of effective assistance so as to undermine confidence in the outcome of the proceedings.[4]

Graves had three attorneys through the course of his case. His first attorney capably represented him during his preliminary hearing, and found and interviewed two witnesses favorable to Graves, before withdrawing from the case. His second attorney represented Graves at a hearing in which Graves waived a jury trial. Shortly thereafter Graves fled the state, was picked up in Iowa, and was extradited to Oklahoma in February, 2004. On May 21, 2004, five days before the scheduled trial date, Graves's second attorney requested a continuance of the bench trial in part because he had been told a third attorney would also be defending Graves and had some issues to raise with which the second attorney was unfamiliar. The record shows that the second attorney did not participate in the pretrial motions filed by the third attorney. The third attorney did not orally enter an appearance until the beginning of trial, but, as the trial court noted, "[he] has visited with me about entering this case for any number of purposes."[5] During the bench trial, the second attorney examined the witnesses, but the third attorney rose to object or argue, and separately argued issues he had prepared without the second attorney's consultation. After the trial ended, the third attorney filed several motions, including a motion for new trial, without the second attorney's assistance. The third attorney also attended the sentencing and spoke in addition to argument presented by the second attorney. It is clear that

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[4] *Rompilla*, 125 S.Ct. at 2462; *Wiggins*, 539 U.S. at 521, 123 S.Ct. at 2527.

[5] Trial Tr. at 3.

these attorneys were not representing Graves together in any spirit of cooperation, and the record reflects that this impeded any coherent presentation of a defense.

The record shows the second attorney acted competently in initially allowing Graves to waive a jury trial. Graves was caught with enough drugs on him to warrant a trafficking charge, and with three prior convictions his only sentencing option was life imprisonment without parole. His best defense was his claim that his initial search and seizure violated the Fourth Amendment, and the evidence against him should have been suppressed. Under these circumstances, a decision to forego a jury trial, while preserving the Fourth Amendment issue for any appeal, is reasonable trial strategy.

Graves raises several other areas in which he claims counsel was ineffective. These include the failure to invoke the rule of sequestration and failure to ask the court to consider a lesser included offense. Taken together, these claims reflect the difficulties counsel had in working together on Graves's behalf. The second attorney questioned witnesses during trial. However, the third attorney made statements and argument on Graves's behalf before, during and after the trial, and filed motions with and without the second attorney. The record is by no means clear as to which attorney felt he was the lead counsel in the case, or whether the attorneys agreed on that matter. Under these circumstances, it is not surprising that neither counsel remembered to invoke the Rule, or to bring up the question of any lesser included offenses. Whether or not such invocation was necessary or any lesser included offenses were available is, under these circumstances, beside the point. These failures are simply

an indication of how poorly the advocacy process worked in this case.

Graves claims that counsel was ineffective in making assertions supported by neither evidence nor law. The written motions and some oral argument are replete with statements having no basis in the record. Even worse, counsel insisted on arguing law which did not apply to the issues raised in this case. For example, counsel vigorously argued orally and in written motions that Graves had been entrapped, or been prevented from pursuing an entrapment defense. Taking the facts as liberally as possible from the entire record, there is no entrapment issue in this case. Further, counsel insisted that the trial court lacked jurisdiction to try the case based on an Iowa court order made during the extradition process, which did not in fact affect the court's statutory jurisdiction.[6] Counsel claimed in post-trial motions that the trial court prevented Graves from putting on a defense. Of course, Graves testified during the proceedings in support of the motion to suppress, and had the opportunity to testify as part of a case in chief. Counsel's motions cited case law which was old, of dubious value, and irrelevant. One of counsel's cited cases was later abrogated, and at least one was overruled in part. However, whether good or not, the law cited by counsel bears no relation to issues counsel could have reasonably argued. It defies logic to credit

[6] The Iowa court order directed Iowa law enforcement to release Graves if the Oklahoma governor's warrant was not served by February 10, 2004. Graves was released to Oklahoma officers pursuant to the warrant on February 12. As the trial court noted, giving "full faith and credit" to this court order would not require dismissal of the case, as the Iowa court did not, and could not have, required that remedy.

counsel for arguing defenses, facts and issues not present even according to Graves's own story.

Graves's claim that counsel was ineffective in failing to have the evidence against him suppressed clearly illustrates two problems with the representation in this case. First is the problem of two attorneys arguing at cross-purposes. The second is even more damaging. Counsel's argument as articulated to the trial court and in the written motions displays a serious failure to understand the applicable law. Officers were visiting the women in Room 206 when Graves knocked on the door. Officers testified that they let him in, saw crack cocaine clutched in his fist, and arrested him. Graves testified that he knocked on the door carrying only his keys, officers opened the door and immediately grabbed and cuffed him, then searched his pocket and found the drugs. Graves had a claim that his Fourth Amendment right against illegal search and seizure were violated when, according to him, police searched him with neither reasonable suspicion nor probable cause to believe a crime occurred. However, the written motions and oral argument on this issue claimed that the search and seizure had violated Graves's "right to privacy", apparently because the search happened in a motel room. There is absolutely no evidence that Graves had any connection with the motel room other than his presence in it. There is no credible argument of expectation of privacy, and certainly none which outweighs the obvious claim that this was an unjustified warrantless search. In addition, the motions cite cases on, for example, unauthorized entry into private property, exceeding the scope of a search after a lawful arrest, and search of a

parolee's home. While they may be good law,[7] these cases are not relevant to the issues in this case.

Trial counsel should have at least attempted to use the statements that Fields and Hargrave, two women in the motel room during the search and seizure, gave to preliminary hearing counsel. These statements appear in the record because counsel attached them to a motion for new trial filed after conclusion of the proceedings. While there were minor inconsistencies, each woman said that officers let Graves in, his hands were empty of drugs, the officers immediately cuffed and searched him, and officers pulled the cocaine from Graves's pocket. That is, each statement substantially supported Graves's testimony. Counsel repeatedly asked for continuances to find these women to testify in his case in chief, and the trial court granted a week's continuance for that purpose. When the women proved unavailable, counsel made no effort to use their statements either in support of Graves's motion to suppress or in his case in chief.[8] The State urges us to conclude that this failure would not have affected the ruling on the motion to suppress, since the statements were inconsistent and the witnesses were unsavory (and thus presumably untruthful) and apparently unwilling to

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[7] At least two of the cases cited in this motion are no longer good law.

[8] Appellate counsel argues that trial counsel should have produced these statements in support of the motion to suppress. This is true as far as it goes. However, the trial court granted a week's continuance so trial counsel could find these witnesses to present as part of his case in chief, as well as to the suppression motion. The motion was heard during the trial testimony and would clearly form the basis for any appeal. This should not distract us from the fact that counsel were preparing for, and conducting, a trial as well as the motion to suppress.

testify. While the trial court may not have been swayed by this evidence, counsels' blatant failure to present it is part of the pattern of failure, miscommunication, and error that dogged this trial.

Given the facts of his case, Graves had virtually no chance. The actions of his trial "team" made his case even worse. Counsel worked at cross-purposes in law and argument, completely failed to present favorable evidence in possession of the defense, insisted on arguing issues and defenses not present in the case, failed to argue relevant law during the suppression hearing, and misstated both facts and law. Reviewing the proceedings as a whole, the Court has no confidence that counsel fulfilled the function of making the adversarial testing process work.[9] The case is reversed and remand for a new trial with effective counsel.[10]

Decision

The Judgment and Sentence of the District Court is **REVERSED** and the case **REMANDED** for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch18, App.2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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[9] *Glossip v. State,* 2001 OK CR 21, 29 P.3d 597, 600; *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.

[10] Given our resolution of Proposition I, we do not reach Graves's remaining propositions of error.

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OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.: DISSENT
C. JOHNSON, J.: SPECIALLY CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR IN RESULTS

LUMPKIN, VICE-PRESIDING JUDGE: DISSENTS

I dissent to the reversal of this case based upon the ineffectiveness of counsel. While I agree that counsel's decision to waive jury trial was reasonable trial strategy and therefore not ineffective, I disagree with the conclusion that the two attorneys representing Appellant at trial

worked at cross-purposes and failed to adequately present a defense. In arriving at its conclusion, this Court appears to have given only lip service to the presumption of counsel's competence and the deference to be accorded strategic decisions. It is important to remember that in reviewing claims of ineffectiveness, a court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland,* 466 U.S. at 690, 104 S.Ct. at 2066. And in making the determination whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance, a reviewing court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. *Id.*

In the present case, defense counsel were presented a case where the defendant was apprehended with the cocaine on him, he admitted to the possession of the cocaine, and the two other people in the motel room with the defendant were unwilling to testify in court under oath. This left counsel with presenting the only available defense, that the search was illegal, through the testimony of Appellant, a convicted felon facing life imprisonment without the possibility of parole who fled the state during the pendency of this case. Under these particular circumstances, any errors or omissions by trial counsel were not outside the wide range of professionally competent assistance and counsel fulfilled the function of making the adversarial testing process work.

The opinion finds it unnecessary to address the merits of trial counsels' failure to invoke the Rule of Sequestration and to request lesser included offense instructions

calling these failures indications of how poorly the advocacy process worked in this case. On the contrary, by looking at the merits of these legal issues, it becomes clear that the State's case was subjected to sufficient adversarial testing.

The sequestration of witnesses is not mandatory. *See* 12 O.S.2001, § 2615. *See also Dyke v. State,* 1986 OK CR 44, ¶ 13, 716 P.2d 693, 697. The process of sequestration consists merely in preventing one prospective witness from being taught by hearing another's testimony. *Gee v. State,* 1975 OK CR 133, ¶ 21, 538 P.2d 1102, 1108.

The State's case consisted of three witnesses. Both Officers Hickey and Gatwood were investigating officers; therefore they were subject to an exception to the rule of sequestration. *See Dyke,* 1986 OK CR 44, ¶ 13, 716 P.2d at 697. *See also* 12 O.S.2001, § 2615(2). The third prosecution witness, Mr. Schroeder, was a forensic scientist who confirmed the substance taken from Appellant was crack cocaine. His testimony was scientific in nature and not subject to being influenced by the testimony of the officers. Also, the record is not clear whether the two officers were actually in the courtroom during each other's testimony. Assuming arguendo, the officers were in the courtroom during each others testimony, any discrepancies between the officers' testimonies was brought out on cross-examination. Therefore, counsel's failure to invoke the rule of sequestration was not professionally unreasonable as there is no reasonable probability that the verdict would have been different if the rule had been invoked

Counsel was also not ineffective in failing to ask the court to consider possession with intent to distribute as a lesser included offense. *See Phillips v. State,* 1999 OK CR

38, ¶ 104, 989 P.2d 1017, 1044. Appellant's possession of 7.19 grams of crack cocaine met the statutory elements of trafficking and no other evidence warranted instructions on a lesser included offense.

Counsels' failure to have the evidence against Appellant suppressed is also not a sign of ineffectiveness. *See Rushing v. State,* 1984 OK CR 39, ¶ 83, 676 P.2d 842, 856 (effective assistance of counsel does not mean that a defendant is entitled to flawless or victorious counsel). The suppression of evidence is a judicial question and this Court will not reverse the trial court upon a question of fact where there is a conflict of evidence, and there is competent evidence reasonably tending to support the judge's finding. *Battiest v. State,* 1988 OK CR 95, ¶ 6, 755 P.2d 688, 690. Although the evidence in this case was conflicting, the officers' testimony provided sufficient competent evidence to support the court's finding to deny the motion to suppress.

The record shows defense counsel repeatedly asked for continuances in order to locate defense witnesses who could corroborate Appellant's testimony. Unable to locate the witnesses, defense counsel was left with only Appellant's testimony. Written statements prepared earlier by defense witnesses corroborated Appellant's testimony only in part. Other parts of their statements were not only inconsistent with Appellant's testimony, but inconsistent in themselves. Additionally, after a thorough review of defense counsels' written motions, I find Appellant was not prejudiced by any deficiencies therein.

In reviewing claim of ineffectiveness, the ultimate focus must be on the fundamental fairness of the trial. Accordingly, I find Appellant has failed to rebut the strong

presumption that counsel's conduct was professionally reasonable and that he has failed to show that he was denied a fundamentally fair trial. In reality, this is a case wherein Appellant has merely developed a case of "buyer's remorse" arising out of his absconding and arrest in Iowa in between the waiver of the right to jury trial and the date of the non-jury trial. Appellant was represented by three different retained attorneys during the course of these proceedings, two of whom represented him at the trial. He chose his attorneys. He knowingly waived his right to a jury trial. There is no basis in law or fact to reverse this case based on Appellant's valid decisions. This Court should render its decision on the law and facts as was presented to the trial court and not based on the fact the court might have tried the case differently. I must therefore dissent to the Court's decision in this case.

C. JOHNSON, J.: SPECIALLY CONCURS

I specially concur in the Opinion of the Court and agree the case must be reversed and remanded based upon ineffective assistance of counsel. I write specially because I have a major problem with the arrest and search. Hopefully, on remand the district court will again look at the arrest and determine whether there was probable cause under the facts to arrest and handcuff a person who just walks into a room. A plastic bag visible in someone's hand does not appear to constitute probable cause to arrest and to handcuff someone, and then search. Questions should have been asked first.

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ARTHUR GERALD GRAVES Appellant, v. THE STATE OF OKLAHOMA Appellee.	)	NOT FOR PUBLICATION Case No. F-2004-688

ORDER DENYING PETITION FOR REHEARING

(Filed Feb. 14, 2006)

Arthur Gerald Graves was tried in a non-jury trial and convicted of Trafficking in Illegal Drugs in violation of 63 O.S.Supp.2002, § 2-415, After Former Conviction of Two or More Felonies, in the District Court of Tulsa County, Case No. CF-2002-5443. The Honorable Tom C. Gillert sentenced Graves to life in prison without the possibility of parole and a $25,000 fine.

This court granted Graves's appeal in an opinion filed on January 20, 2005. The State is now before the Court on a petition for rehearing. A petition for rehearing may be filed only for one of the following reasons:

(1) Some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or

(2) The decision is in conflict with an express statute or controlling decision to which the

attention of this Court was not called either in the brief or in oral argument.[1]

The State's Petition for Rehearing fails to meet the criteria set forth in Rule 3.14 and is **DENIED**.[2]

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 14th day of February, 2006.

/s/ Charles S. Chapel
CHARLES S. CHAPEL, Presiding Judge

/s/ Gary L. Lumpkin DISSENTS
GARY L. LUMPKIN, Vice Presiding Judge

/s/ Charles A. Johnson
CHARLES A. JOHNSON, Judge

/s/ Arlene Johnson
ARLENE JOHNSON, Judge

/s/ David B. Lewis
DAVID B. LEWIS, Judge

ATTEST:

/s/ Michael S. Richie
Clerk

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[1] Rule 3.14(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18. App. (2005).

[2] The State claims our decision in this case overlooks a legal issue and thus conflicts with controlling case law. This Court thoroughly reviewed and considered all controlling authority, and applied the appropriate legal test, in concluding that Graves received ineffective assistance of counsel.